"THE LAW" AND THE LAW OF CHANGE.

A Tentative Study in Comparative Jurisprudence.

*Introduction.**

"The Law"—let us rather say Torah. For Torah, literally teaching, denotes the whole of what has been revealed to Israel throughout the ages—the teaching of the right way of living. The rabbis of the Talmud speak of "two Torahs": the Holy Scriptures or written law, which is the foundation, and the oral tradition or unwritten law, which is the development. Or: the Torah explicit, and the Torah implicit. The Old Testament moulded the Jew's faith, but it did not restrain his thoughts. Though in theory the legal canon was closed forever, it did not in fact prevent Israel from interpreting and developing its laws and precepts with life-giving freedom. Post-Biblical Jewish law actually went beyond Scripture. New provisions had to be created to meet new conditions which could not have been foreseen. The Scribes and, later, the rabbis, for political, national and—natural reasons, endeavored to create, by legal fictions, by equity and by legislation, a "hedge round the Torah," a "chain of tradition." The "law of change"—a law of nature—was thus obeyed by "Catholic Israel." The cry, "Back to Moses," of the short-sighted Sadducees was answered by attempts to commit to writing the oral law, out of which attempts the Mishnah, the first post-Biblical code, was compiled, and about which, for the same natural reasons, grew up the Gemara—the two making the Talmud, properly so called. Compiled, sifted and committed to writing, it failed to answer all the questions that changed conditions suggested. The "Responses" of the Geonim mark the beginning of post-Talmudic legal activity which is still going on. The "second Torah," written and still being written down, has not ceased to be designated as the oral law.

As the Old Testament is a combination of precept and narrative, so is the Talmud no mere law-book compiled by jurists.

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Broadly, the Talmudic literature is characterized as Halakhah (way of life, laws) and Haggadhah (narrative, instruction or homily). We should further bear in mind that among the Jews the distinction between religious and secular law was not known. The division by scholars of the Mosaic legislation into moral, ritual and legal laws is wholly arbitrary. Such distinctions are of a comparatively late origin even in Western Europe.

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Modern Old Testament scholarship sees in Biblical legislation not the product of one author or of one generation, but of centuries. Like all law, it was a growth—an expression of Israel's national life. It passed through the various law-stages which Sir Henry Maine observed in the historic development of Roman and Indian law: from the unwritten to the written, from the formal to the equitable, and so on. Maine in his *Ancient Law,* it would seem, has deliberately avoided drawing illustrations for his principle of legal development from Biblical legislation. The literature on the subject that has grown up since Maine's day concerns itself with the sources and the forms of Biblical laws, with questions of origin and growth or, since the discovery of the Hammurabi Code especially, with their relation to other Semitic legislation, and is in the main the work of archaeologists and Semitists, and not of jurists. From the latter we have but a few monographs on special legal provisions and some occasional remarks on casual analogies.

Modern study of the Talmud lags behind the critical study of the Old Testament. The Talmud has been one of the principal subjects of research among modern Jewish scholars. Within the last fifteen years Talmudic literature has occupied Christian scholars also. The principles of both higher and lower criticism are now being applied to it. Of the numerous scientific monographs on special subjects in the Talmud, not a few are concerned with its purely legal elements. The scientific study of Talmudic law was first introduced by Z. Frankel (1846).[1] Since then a considerable literature on the subject has grown up. Most

[1] One earlier isolated case should be noted, however. Edward Gans' *Erbrecht* contains a chapter entitled *Die Grundzüge des mosaisch-talmudischen Erbrechts,* first published in the *Zeitschrift für die Wissenschaft des Judenthums,* Berlin, 1823.

of it, to be sure, consists of monographs on special laws; while the few works that treat of the general subject are not so much concerned with the system of Talmudic law as with the provisions of this law. Post-Talmudic or latter rabbinic law, it should be noted, is a rather neglected field. Only a beginning is here discernible. But neither Talmudic nor post-Talmudic law has exercised the minds of legal students to any appreciable degree.

Comparative jurisprudence, excepting in occasional references pointing out analogies in forms and provisions, has taken no account of Talmudic law. J. Kohler, the well-known German jurist, may perhaps be regarded as the pioneer in this field also. On the basis of Goldschmidt's German translation of the Babylonian Talmud (in progress), Kohler published a study entitled *Darstellung des talmudischen Rechtes* (1907). This work, however, does not comprise the whole of the legal portion of the Talmud proper; nor does it take account of such preëminently Halakhic works as the Ṣiphre, *etc.* It is to Kohlers's credit, though, that he is the first jurist who is not at all a Talmudist to have won Talmudic law for scientific study. He "rationalized" and systematized a good part of it, and he did it with a thoroughness of scientific method that does not leave much to be desired. A scientific method, however, does not of itself produce a science. Besides, his study is one in comparative law rather than in comparative jurisprudence.

To recapitulate: of scientific studies of the whole of Jewish law (Biblical, Talmudic and post-Talmudic) there are none—always excepting the necessarily eclectic articles in cyclopedias; of monographs there are a considerable number: good, bad and indifferent, adding stone after stone to the edifice; while a survey of the whole field in the light of comparative jurisprudence seems never to have been attempted. Dr. Isaacs is thus the first in the field.

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The present study, written with a deeper knowledge of jurisprudence than Talmudists can claim and a larger knowledge of Jewish history and literature than jurists generally possess, dis-

cerns the consecutive stages in Jewish "Law." The road pointed out by Maine, Dr. Isaacs is the first to travel in the field of Jewish legal history.[2] By bringing to bear the progressive character of modern jurisprudence on Israel's experience under the "Law," we gain the fruitful conception that the law-cycles are recurrent, that they are universal—and not limited to the "Aryan race," as ethnic prejudice would assert. Our author, it should be remarked, does not think of the cycles as stratified layers, nor of their recurrence as a kind of Pythagorean Apokatastasis or Nietzschean *ewige Wiederkunft.* The recurrent cycles do present an upward development: recurrent, they start from the comparatively higher order which has previously been attained.

Law changes as language changes—perhaps *because* language changes. Laws are words; words are laws. In the beginning there were customs, conventions—words. They became laws. We have codification. Codification is law (or language) stereotyped, rigid, fixed, dogmatic—prosaic. The experience reflected in the code is of the past; and life brings new experiences. The words acquire new meanings or shades of meanings in different generations; among different individuals of the same generation. "What do they mean?" becomes the vexing question. Glossation inevitably follows. The scribes, the learned, the lawyers, or the judges are to discern their "true" meaning by a logical process of reasoning. Alas! reason soon becomes pseudo-logical syllogism and sinks into mere playing with words —with words or laws dead or dying; with words without con-

[2] While seeing this article through the press, we have come upon the footprints of a predecessor, at least along the beginning of the road. The *Jewish Review* (London, 1914, Vol. 4) contains an interesting article on *Legal Devices* by Bertram B. Benas, in which the second chapter of *Ancient Law* is quoted along with Blackstone and Dicey mainly in an effort to justify the legal evasions of the law as "fictions." In commenting on the characteristics in legal history pointed out by Maine, the author remarks that "many of them are capable of almost complete illustration by Jewish legal history." Mr. Benas, however, seeks illustrations for only two: the resort to fictions and growth by *responsa prudentium.* Without Dr. Isaacs' theory of recurrent cycles it would be difficult to apply Maine's principal observation, the sequence of the instrumentalities, to Jewish law. And Mr. Benas, indeed, feels called upon to explain why legislation seems to appear in the wrong place: the Jews, he says, have no legislation in Maine's sense! The article, though apologetic in its purpose, is well worth reading, as is its companion-piece by Rev. Isaiah Raffalovich.

tent or meaning. Endowed with "a large and liberal discontent," man soon speaks of "legalism," and yearns for a live message. Commentation sets in. The word or the law now becomes suggestive, anti-intellectual, creative—poetical. Man rejoices in anticipation of an endless "creative evolution." His imagination is stirred—only too soon to find that it is degenerating into wild fantasy. "True," he says, "the Universe is strange and deep and mysterious; but reason, too, is godly and something worth while." *Vernunft fängt wieder an zu sprechen.* . . . Life must be made orderly. He craves for reason, for order, for fixity, for—legislation. Legislation tends to become codification. And the law-cycle begins anew. Law, like every other natural phenomenon, we are taught, is subject to the "law of change."

Original in content, Dr. Isaacs' study is not less so in outlook. It establishes points of contact with present-day currents of thought. It breaks new ground. Thus, among numerous other things, it is implied that there was considerable likeness between the development of rabbinic and Christian thought. In consequence, polemics against "The Law" will now look more ridiculous than ever. For, if the "hedge" of the rabbis was at one time "legalism"—glossation—an outward form of law and precept, it was such at one stage in the cycle; it became commentation (equity) in the next. "The Law," then, taken together, presents a consistent, logical or, if you please, legal and equitable endeavor to work out a complete guide to the living of a perfect life. Further: the history of the oral tradition is beset with difficulties to both the traditionalist and reformer. All kinds of theories have been tried in the balance: those of Frankel, Hoffman, Weiss, Halévy and Professor G. Deutsch; and all were recently found wanting by Professor J. Z. Lauterbach. Related problems are the feud between the Sadducees and the Pharisees, the dissension of the Judaeo-Christians, the Karaite schism, *etc.* Again, scholars are puzzled to find anti-Pharisaic or anti-traditional laws in the works of Philo, of whose piety and earnestness there can be no doubt, and in those of Josephus, an avowed Pharisee. President K. Kohler, in an essay just published, dis-

cerns in the Halakhah "a middle stage between Sadduceeism and Pharisaism." To the students of these historical problems Dr. Isaacs' principle holds out a light. Not that it attempts to solve all the problems. But in the new light of his observations the one current theory may perhaps be verified, the other modified and the problems formulated anew. It is also highly interesting to view more recent Jewish movements under the strong searchlight thrown by this study in comparative jurisprudence.

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However, the study can safely be left to speak for itself. Dr. Isaacs has earned the thanks of students belonging to different schools. He neither reverts to the traditional view, nor accepts unreservedly that of the critics, nor attempts a compromise between the traditional and the critical schools. Differences of opinion as to minor details are, of course, inevitable; but since our author does not press unimportant points, they may well be overlooked. They do not in the least affect the general course of the argument. It is, indeed, a delightful spectacle to view Jewish law as a whole, and as a connected whole; to see its "reason," its unity, its soul. Truly, here we behold a "government of laws, not of men."

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